

No. 83-1477

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In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM NEZOWY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether any error in allowing the government's cross-examination of a defense witness, which revealed that the witness had invoked her Fifth Amendment privilege before the grand jury, was harmless in the circumstances of this case.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	14

TABLE OF AUTHORITIES

Cases:

<i>Chapman v. California</i> , 386 U.S. 18	6, 9
<i>Doyle v. Ohio</i> , 426 U.S. 610	9
<i>Fahy v. Connecticut</i> , 375 U.S. 85	6
<i>Grunewald v. United States</i> , 353 U.S. 391	7, 8, 9, 10, 11, 12
<i>United States v. Hasting</i> , No. 81-1463 (May 23, 1983)	9, 11
<i>United States v. Natale</i> , 526 F.2d 1160, cert. de- nied, 425 U.S. 950	5, 6, 7, 10
<i>United States v. Williams</i> , 464 F.2d 927	10

Constitution, statutes and rule:

U.S. Const. Amend. V	4, 7, 8, 9, 10, 11, 12
18 U.S.C. 1001	2
18 U.S.C. 1422	2
28 U.S.C. 2111	8
Fed. R. Evid. 403	11

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 723 F.2d 1120.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1983. The petition for a writ of certiorari was filed on February 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on three counts of making false

statements to the Immigration and Naturalization Service, in violation of 18 U.S.C. 1001 (Counts One, Four and Eight). He was sentenced to a two-year term of imprisonment with parole eligibility after six months on Count One, and to two five-year terms of probation on Counts Four and Eight, all the sentences to run concurrently.¹

1. The evidence at trial showed that petitioner was associated with Louis Konowal, an attorney who represented clients before the INS. Petitioner acted as an "immigration consultant" on behalf of Polish nationals and, because he was fluent in Polish, would often accompany clients to INS interviews as a translator. Pet. App. 1a. Unbeknownst to Konowal, petitioner filed political asylum applications with INS in the name of clients who were unaware of this action and who specifically had denied petitioner permission to seek political asylum on their behalf (*id.* at 1a-2a, 3a).

In response to complaints about petitioner's activities, INS had arranged for a Polish-speaking INS employee to conduct an applicant interview at which petitioner acted as interpreter for his client (*id.* at 2a). The INS employee testified at trial that petitioner translated the questions he had put to the applicant inaccurately, deleting all references to politi-

¹ Petitioner was originally indicted on 11 counts of making false statements to the INS. He was acquitted by the jury on three of these counts, the court directed a verdict of acquittal on a fourth count, and four false statement counts were dismissed before trial. Petitioner was also indicted on ten counts of collecting fees for his services in excess of those permitted by law, in violation of 18 U.S.C. 1422. Four of these counts were dismissed before trial, the district court directed a verdict of acquittal on a fifth count, and petitioner was acquitted at trial on all of the remaining counts.

cal asylum and leading the client to believe that the questions dealt with establishment of permanent residence in this country (6 Tr. 21-29).

Petitioner testified on his own behalf, asserting that all of the aliens had authorized him to seek asylum. He also called Anna Kushnir, his part-time secretary, as a defense witness (Pet. App. 3a). The bulk of Kushnir's testimony concerned office practices and accounting procedures employed in petitioner's enterprise with Konowal (*ibid.*). Her testimony was also offered to discredit Konowal's testimony, presented by the government, that he was unaware of petitioner's activities and had derived no fees from them, and to offer an account of portions of interviews between petitioner and two different aliens (*id.* at 3a-4a). In the latter connection, Kushnir stated that she had been present when Marian Grech consented to the filing of a political asylum petition and had heard part of a conversation in which petitioner had assured Barbara Pas Economopoulos that he had withdrawn her political asylum application (*id.* at 4a).

Kushnir also testified that when she appeared before the grand jury as a possible suspect in the investigation of this case, an Assistant United States Attorney had threatened her with denaturalization and deportation if she did not cooperate (Pet. App. 4a). To rebut the claim that Kushnir had been badgered and harassed, the government cross-examined Kushnir about her appearance before the grand jury (*ibid.*; 7 Tr. 186). The prosecutor read from the grand jury transcript a passage in which Kushnir was informed of (1) the object of the grand jury's investigation, (2) her right to refuse to cooperate if to do so might be incriminating, (3) the uses the

grand jury could make of her testimony, (4) her right to counsel, and (5) her status as a suspect in, but not a target of, the investigation (7 Tr. 183-184). Kushnir then acknowledged that she had been so advised (*id.* at 185).

To show further that Kushnir's will had not been overborne, as implied by her testimony, and that she had understood her rights and was "perfectly capable of standing up to the [g]overnment," the government sought to show that Kushnir had heeded the Assistant United States Attorney's advice of rights and had invoked her Fifth Amendment privilege (7 Tr. 188). The district court allowed the testimony for that limited purpose. To confine the inquiry to the invocation of the privilege—to the exclusion of the question that provoked it—the court directed the government not to read the exchange from the transcript of the grand jury proceedings, but simply to ask Kushnir whether she had invoked her Fifth Amendment privilege on the day she appeared before the grand jury. *Id.* at 189. Petitioner's counsel objected to the question but did not request any limiting instruction, either then or as part of the general instructions to the jury. When questioning resumed, Kushnir testified that she had understood the rights of which she had been informed and confirmed that she had invoked her Fifth Amendment privilege (*id.* at 190).

The government did not advert to the subject again. On redirect examination, however, petitioner's counsel returned to the subject and elicited again from Kushnir that she had invoked her Fifth Amendment privilege (7 Tr. 198). In the ensuing examination, Kushnir testified that she had told the Assistant United States Attorney assisting the grand jury that

she "wasn't going to take his threats anymore" (*id.* at 200), had asked for an attorney (*ibid.*), and had informed the magistrate who appointed an attorney for her about the threats that she said had been made (*id.* at 201).

2. On appeal, a divided panel of the court of appeals affirmed. At the outset, the panel majority observed that "there was clearly sufficient evidence to support [petitioner's] convictions" (Pet. App. 2a).² The court then turned to the alleged trial error involving Kushnir's cross-examination. The court of appeals held that the government's questioning of a defense trial witness as to whether she had claimed the privilege against self-incrimination in the grand jury proceedings constitutes trial error, subject only to application of the harmless error rule (Pet. App. 8a). "[A] careful examination of the record satisfie[d]" the court, however, that the potential for prejudice to a defendant from such questioning had "not crystallize[d] into that degree of prejudice which * * * would compel a reversal of [petitioner's] conviction" (*id.* at 9a).

In making the harmless error determination, the court of appeals applied the test of *United States v. Natale*, 526 F.2d 1160, 1171 (2d Cir. 1975), cert. denied, 425 U.S. 950 (1976), which requires a court to evaluate both the remoteness of the witness's testimony to the crime charged and the likelihood that the jury became confused and associated a defendant with a witness' assertion of the privilege (*ibid.*). The court observed that "Kushnir's testimony was

² The court of appeals also rejected petitioner's claim that the trial judge erroneously failed to instruct the jury on concealment and authorization (Pet. App. 3a n.3).

either given full credit when exculpatory, or else was so remote from the crimes charged * * * that the first criterion of the *Natale* rule was fully satisfied" (*id.* at 11a). As for the second prong of the *Natale* rule, the court found it "highly implausible that a jury could have impermissibly imputed Kushnir's invocation of her fifth amendment privilege to [petitioner]" in light of her insignificant position in the office structure, the absence of any suggestion at trial that she was implicated in petitioner's scheme and the brevity of the disputed cross-examination in the midst of a nine-day trial (*id.* at 12a).

Judge Adams dissented (Pet. App. 14a-24a). Initially, he suggested (without deciding) that the harmless error inquiry here is subject to the standard of *Chapman v. California*, 386 U.S. 18 (1967), and *Fahy v. Connecticut*, 375 U.S. 85 (1963), and that petitioner's conviction could not survive scrutiny under that standard (Pet. App. 17a-23a). (The panel majority responded that, even under *Chapman* and *Fahy*, the error found here was harmless because there was "no reasonable possibility that the questioning of Kushnir might have contributed to the conviction" (Pet. App. 13a n.8).) Judge Adams rested his dissent upon his divergent assessment of the impact of Kushnir's testimony and the likelihood that the jury inferred petitioner's guilt from Kushnir's invocation of her privilege against self-incrimination (*id.* at 23a-24a).

ARGUMENT

1. Petitioner contends (Pet. 11-19) that the court of appeals improperly failed to apply a per se rule that prosecutorial questioning at trial of a defense witness about an assertion of Fifth Amendment privilege during the grand jury proceedings is reversible error. He maintains that such a per se rule is required by this Court's decision in *Grunewald v. United States*, 353 U.S. 391 (1957), and that the court of appeals' adoption of the harmless error analysis of *United States v. Natale*, 526 F.2d 1160 (2d Cir. 1975), cert. denied, 425 U.S. 950 (1976), was improper. Petitioner also claims that the circumstances of this case mirror those in *Grunewald* and require reversal of his conviction. These arguments are wholly without merit.

a. In *Grunewald*, defendant Halperin appeared before the grand jury and declined to answer any questions on the ground that the answers would tend to incriminate him. He insisted on his innocence, however, and stated that he refused to answer only on the advice of counsel that answers might furnish evidence that could be used against him. 353 U.S. at 416. At trial, some of these same questions were put to him, and he answered in a manner consistent with innocence. Over objection, the government was then permitted to show that the defendant had asserted his privilege in answer to these questions during the grand jury proceedings. 353 U.S. at 416-417. The court later instructed the jury that the defendant's invocation of the Fifth Amendment could be considered only insofar as it reflected upon the credibility of his trial testimony and could not be used to support an inference of guilt or innocence. 353 U.S. at 417.

This Court held the cross-examination impermissible in "the circumstances of th[e] case" (353 U.S. at 424). What made it impermissible was the district court's failure to consider whether Halperin's prior assertion of the Fifth Amendment could properly be viewed as a prior inconsistent statement, and thus a proper basis for impeachment. Deciding that Halperin's invocation of the privilege was "wholly consistent with innocence" (353 U.S. at 421), this Court found no inconsistency in Halperin's testimony before the grand and petit juries, and concluded that the cross-examination was improper. 353 U.S. at 420-422. Because the cross-examination was not probative on the issue of credibility, the only basis on which it had been allowed, and because there was an unacceptable likelihood that the jury might improperly have treated the assertion of the privilege as an admission of guilt, this Court reversed the conviction on the basis of an evidentiary ruling that ordinarily would be left to the trial court's discretion. 353 U.S. at 423-424.

Plainly *Grunewald* itself does not support petitioner's contention (Pet. 12) that cross-examination with respect to a witness' invocation of Fifth Amendment privilege can never be harmless error. The Court repeatedly emphasized that its decision rested upon the "particular circumstances" of the case before it. 353 U.S. at 420, 421, 424. Moreover, the Court's analysis, which focuses upon the fact-bound question whether the contested cross-examination revealed a prior inconsistency reflecting upon the defendant's credibility, essentially establishes a rule of evidence that is appropriately subject to the harmless error rule. See 28 U.S.C. 2111. The Court also took considerable care to detail the facts of the case that accounted for its conclusion that the cross-

examination in *Grunewald* was prejudicial error. Thus *Grunewald* assuredly does not establish an ironclad rule requiring reversal of a conviction because of cross-examination of a witness as to his invocation of the privilege against self-incrimination.³

In any event, in light of *Chapman v. California*, 386 U.S. 18 (1967), which holds that even prosecutorial comment upon the failure of the defendant himself to testify, in derogation of the defendant's Fifth Amendment privilege, could be assessed as harmless error under an appropriate standard (see note 4, *infra*), the contention that *Grunewald* admits of no harmless error exception is frivolous. See also *United States v. Hasting*, No. 81-1463 (May 23, 1983); cf. *Doyle v. Ohio*, 426 U.S. 610, 619-620 (1967) (implying that a harmless error rule may qualify the court's decision that use of a defendant's post-arrest silence to impeach his trial testimony violates due process).⁴

³ Indeed Justice Black, joined by Chief Justice Warren, and Justices Douglas and Brennan, wrote separately in *Grunewald* precisely because he was disinclined to "rest [his] conclusion on the special circumstances of this case." 353 U.S. at 425. Even the separate opinion does not purport to preclude application of a harmless error rule, however. Moreover, because the cross-examination at issue in the instant case was not directed at the defendant, Justice Black's conclusion, "I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it" (353 U.S. at 425), is simply inapplicable. See page 12, *infra*.

⁴ We note that petitioner does not press Judge Adams' suggestion that the constitutional harmless error standard of *Chapman* should have been applied here. Nor did petitioner so argue in the court of appeals (see Pet. C.A. Br. 25-30).

We think it clear that there is no basis for applying the constitutional harmless error standard here. The Court's

Nor, contrary to petitioner's submission (Pet. 16-19), is the decision below contrary to *United States v. Natale*, 526 F.2d 1160 (2d Cir. 1975), cert. denied, 425 U.S. 950 (1976), or *United States v. Williams*, 464 F.2d 927 (8th Cir. 1972). Each of the cited cases recognized the possibility that a *Grunewald* error may be harmless. Indeed, as noted above (page 5), the court below applied the standard for harmless error employed in *Natale*.⁶ And although the error in *Williams* was adjudged prejudicial, there is no suggestion in the Eighth Circuit's opinion that it had adopted the per se rule advocated by petitioner.

b. Also untenable are petitioner's alternative contentions (Pet. 12-15) that this case is factually indistinguishable from *Grunewald* and that the court of appeals misapplied *Grunewald* by failing to consider in its harmless error analysis the particular

decision in *Grunewald* rests essentially upon the conclusion that the defendant's invocation of his privilege against self-incrimination was irrelevant because it was not inconsistent with his later avowals of innocence (see 353 U.S. at 421-423), not upon any view that the cross-examination of the defendant impermissibly burdened the Fifth Amendment privilege. Compare pages 8-9, *supra*. And as previously noted, even if *Grunewald* were regarded as grounded on the constitutional rights of defendants, no basis for application of a constitutional harmless error rule would exist in a case such as this, where the only arguable infringement of constitutional privilege was suffered by a non-defendant witness. As to the defendant, the issue is plainly one to be determined by conventional evidentiary standards of harmless error.

⁶ Petitioner's assertion (Pet. 17-19) that the *Natale* test for harmless error was misapplied rests upon his failure to distinguish between two distinct questions addressed separately in *Natale*: whether examination of a witness is impermissible under *Grunewald*; and whether any error is harmless. See 526 F.2d at 1171.

circumstances that led the *Grunewald* Court to find that the cross-examination in that case was impermissible. Petitioner's rendition of those factors is highly selective and incomplete. Compare Pet. 13-14 with 353 U.S. at 421-423 (see pages 7-8, *supra*). More to the point, however, is that the Court did not purport in *Grunewald* to explore the factors pertinent to an assessment of harmless error; the factual considerations emphasized were relevant to the threshold evidentiary question whether the contested cross-examination disclosed a prior inconsistent statement, and, if so, whether the potential for prejudice outweighed any probative value in the examination. 353 U.S. at 420, 424; cf. Fed. R. Evid. 403. By contrast, the inquiry under a harmless error analysis is whether, notwithstanding the conclusion that a trial error occurred, the conviction should stand because the error can be said, with an appropriate degree of confidence, to have made no difference in the outcome.

In any event, this case is readily distinguishable from *Grunewald*. *Grunewald* teaches that invocation of the privilege against self-incrimination is not inconsistent with a defendant's testimony at trial asserting innocence. Here, however, the witness's acknowledgement that she had invoked her Fifth Amendment privilege was not employed to impeach trial testimony bearing on guilt or innocence, but to rebut the witness's suggestion that she had been browbeaten by the prosecutor. The testimony elicited here thus appears in fact to have been relevant to the point in support of which it was adduced, and it is in our view doubtful that any error was committed. Cf. *United States v. Hasting*, slip op. 2-4 (Stevens, J., concurring). While the court of appeals nevertheless concluded that the probative value of the disputed

cross examination was limited and that it was outweighed by the potential for prejudice to the defendant (Pet. App. 7a-8a), it is at least clear that *Grunewald* is not controlling here.

Moreover, the court of appeals appears to have overlooked, in this branch of its analysis, the fact that the challenged cross-examination was not of the defendant and that the potential for prejudice here accordingly is significantly less than that in *Grunewald*; it is highly unlikely that a jury would infer from a witness's invocation of the Fifth Amendment that the defendant is guilty. Compare 353 U.S. at 423-424. Thus, it is far from clear that any error was made by the district court; assuredly then *Grunewald* does not preclude a finding of harmless error here.*

2. Petitioner also argues (Pet. 20-21) that the admission of the evidence in question was not in fact harmless. He relies for this contention on the factual analysis of the dissenting court of appeals judge. This is a fact-bound question that merits no further review by this Court.

In any case, the harmless error finding is clearly supported by the record. Petitioner was acquitted on all counts of accepting fees beyond the legal limit for his services and on three of six counts of making false statements to the INS. As the court of appeals noted, the "dispositive inquiry" on the false statement counts was "whether the *clients* for whom asylum

* Although the court of appeals concluded that it was error to allow the disputed question on cross-examination, its harmless error ruling rests in part upon much the same considerations as those adduced in text to distinguish *Grunewald* (see Pet. App. 9a-12a).

was sought authorized the activity." Pet. App. 10a (emphasis in original). Kushnir gave relevant testimony regarding the statements of only two clients—Marian Grech and Barbara Pas Economopoulos. Kushnir testified that Grech gave petitioner permission to file for political asylum on his behalf, and the jury *acquitted* him on that count (*id.* at 10a-11a) .

Kushnir also testified that she heard [petitioner] assure Economopoulos that he had withdrawn her political asylum application (Pet. App. 4a). Although petitioner was convicted on that count, the record makes clear that any impeachment of Kushnir could not have been critical to this outcome. First, Kushnir's testimony was not wholly exculpatory; that petitioner had withdrawn Economopoulos's application did not overcome the fact that he had filed it contrary to her instructions. In fact, petitioner withdrew the political asylum application only after Economopoulos made complaints about his activities to the INS. Second, the conversation Kushnir claimed to have overheard among petitioner, Ms. Economopoulos and her husband was tape recorded by the Economopouloses, and the jury was accordingly able to assess the import of that conversation based on highly reliable independent evidence. Kushnir's testimony was, in this respect, superfluous. Finally, Kushnir's testimony that Ms. Economopoulos met initially with Konowal rather than petitioner (set Pet. App. 24a) was not necessarily exculpatory and was contradicted by Ms. Economopoulos (2 Tr. 82-83) and by the testimony that Konowal spoke no Russian or Polish and Economopoulos spoke very poor English.

Thus, as the court of appeals observed, the only genuinely exculpatory testimony that Kushnir provided was fully credited, the remainder of her testi-

mony was "at best tangential to the relevant issues," and any taint on her credibility "could not have worked to the detriment of [petitioner]" (Pet. App. 11a). Moreover, it is highly unlikely that the jury linked Kushnir's invocation of her Fifth Amendment privilege before the grand jury to petitioner in the absence of any suggestion at trial that she was implicated in his scheme, especially given the brevity of the challenged cross-examination in the setting of a nine-day trial, and the lack of any connection between Kushnir's assertion of privilege and any testimony she gave bearing upon petitioner's guilt or innocence. See Pet. App. 12a. The court of appeals' conclusion that any error was harmless in this case accordingly is clearly correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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